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IN THE

Supreme Court of the United States

_____ Term, 1966

No. 365

AMBROSE DISTRIBUTING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Ambrose Distributing Company, Inc., your petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the National Labor Relations Board entered on the 9th day of March, 1966, is reported at

150 NLRB 157, Petition for Rehearing, April 5, 1966, and Order denying Petition for Rehearing, April 26, 1966.

STATEMENT OF THE CASE

The National Labor Relations Board found that the petitioner herein, Ambrose Distributing Company, violated Sections 8 (a) (1) and 8 (a) (3) and (1) of the Act.

The Petitioner herein employs approximately thirty-eight truck drivers, operating out of Wendell, Idaho, a small town of approximately 2,000 people. On or about the 18th day of February, 1964, an election was held among the petitioner's employees, conducted by the National Labor Relations Board, resulting in a loss by the union (R 19-TR 4-5), the employees rejecting union representation.

Most of the 8 (a) (1) acts complained of occurred after the election.

QUESTION PRESENTED

The only issue in this case is whether or not the activities of two employees, Richard Byrd and Thomas Smith come under the rule announced by the Fifth Circuit Court of Appeals in *NLRB v. Birmingham Publishing Company*, 272 Fed. 2d 2 (1959), and followed in:

NLRB v. Park Edge Sheridan Meats, 341 Fed. 2d 728;

NLRB v. Frosty Meat, 296 Fed. 2d 617, at p. 621;

NLRB v. Soft Water Laundries, Inc., 346 Fed. 2d 934 (6-65, 5-CA);

Tompkins Motor Lines v. NLRB, 337 Fed. 2d 325, at p. 330, (6-CA, 1964);

Universal Camera Corporation v. NLRB, 340 US 474.

Are these decisions in conflict with the instant decision by the Ninth Circuit Court? The petitoner feels there s a conflict, and that the same should be resolved by the United States Supreme Court.

RICHARD BYRD

Byrd admits he could have been fired for hitting the bridge and destroying property:

> Byrd — "He (employer) stated that he was a mellow type person, he could have even fired me for hitting this bridge, and he asked if that wasn't correct, and I said, 'yes, I suppose it was' ". (Tr. p. 43, lines 23 to 25)
>
> "Q. So when Mr. Ambrose charged you with negligence in permitting your trailer to fall, you called him a God damn liar, that is right is it not?
>
> "A. That is right." (Tr. p. 49)
>
> Byrd: "At 2 o'clock in the morning of January 14, 1964, I was driving a truck — No. 46 — and

I was headed for Fresno, California, and while we were nearing the top of Donner Summitt near the Nevada-California line, right near the top there is a bridge quite narrow, and it forms a semi-circle . . . just as I approached the bottom of this bridge another semi came over the top of the hill and he was descending quite fast and I could see it was far too fast to be anyway near safe . . . just as he approached right up to the bottom of the bridge I could see he didn't intend to stop and I swung this tractor over to the extreme right as far as I could. I thought I hit the guardrail at the end of the bridge." (Tr. p. 38 and 39).

"Q. Alright, did you file any written report in connection with this with the company?"

"A. As far as an official report is concerned, I didn't."

THOMAS SMITH

Using company money.

"Q. He said (Ambrose) 'how come you are spending your expense money, that is not your money. I said, 'you owe me well over enough to take care of this expense money,' and I said, 'I am going to feed my family as long as I have money in my pocket, whether it is yours or whosever it is.' " (Tr. page 68, lines 5 to 10).

Admits having $132.00 of the company's expense money. (Tr. p. 77, lines 2 and 3).

Destroyed company property:

"Q. Will you relate what were the circumstances of your discharge?"

"A. Yes sir, I had jacknifed a truck on slick highways in Canada, and had done considerable damage."

REASONS FOR GRANTING WRIT

The instant decision in the Ninth Circuit is in conflict with the Fifth, Sixth and Second Circuits on the question of whether an employee guilty of insubordination in the case of Byrd, and an employee guilty of embezzlement of company funds in the case of Smith, may be discharged without penalty of reinstatement even tho the Board found Employer guilty of interference.

In the Birmingham case, Judge Wisdom of the Fifth Circuit, stated:

"If a man has given an employer just cause for his discharge, the Court cannot save him from the consequences by showing that he was pro-union and his employer anti-union. The company has a right to operate its plant efficiently. If an employee is both inefficient and engaged in union activity, that is a coincidence that does not destroy the just cause for his discharge."

NLRB v. Birmingham Publishing Company, 272 Fed. 2d 2 (1959)

In *NLRB v. Park Edge Sheridan Meats, Inc.*, 341 Fed. 2d 728, concerning a discharged employee with a criminal record, the court stated as follows:

> "On the other hand, if an employee is discharged for neglect and delinquency, there is no violation simply because he was engaged organization, and the employer sheds no tears at his loss."

In the same case, the court cited among other cases, *Local 357 International Brotherhood of Teamsters v. NLRB*, 365 US 667, at p. 679 and 680, (an opinion in which Justice Harlan concurred):

> "Reconciliation of these two principles (union activities v. good cause for discharge) has its difficulties, especially in cases where the discharge was placed on a permissable ground and the employee's conduct, while sufficient ground for discharge was not so egregious to demand it."
>
> *NLRB v. Park Edge Sheridan Meats, Inc.*, 341 Fed. 2d 728.

The Court goes on to state that where, as in this case, there was no evidence that employees had not been discharged for similar acts of dishonesty and insubordination, the right to discharge was in order.

CONCLUSION

In conclusion, the question presented by this case, which seems to be in dispute in the various Circuits is whether or not an employee guilty of deliberate, ad-

mitted insubordination, and or an employee guilty of embezzlement or use of the company's monies, have rendered themselves completely useless and non-productive as employees, and have therefore earned the right to be discharged. Obviously the employer should not be required to keep an employee who has admitted embezzling of the employer's money. Such a rule would invite further defalcation and insubordination.

DATED: This 15th day of July, 1966.

Respectfully submitted,

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APPENDIX A.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 19-CA-2825

AMBROSE DISTRIBUTING COMPANY

and

GENERAL TEAMSTERS, WAREHOUSEMEN, CHAUFFEURS & HELPERS UNION LOCAL No. 483, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (Independent)

DECISION AND ORDER

On November 13, 1964, Trial Examiner Wallace E. Royster issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated

its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in the case, including the Respondent's exceptions, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., Feb. 9, 1965.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

150 NLRB No. 157

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,200

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMBROSE DISTRIBUTING COMPANY,

Respondent.

DECREE

Before: Pope, Jertberg and Duniway, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, its officers, agents, successors, and assigns, on February 9, 1965. The Court heard argument of respective counsel on January 14, 1966, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit

that Ambrose Distributing Company, Wendell, Idaho, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in General Teamsters, Warehousemen, Chauffeurs & Helpers Union Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Independent) or in any other labor organization by means of discharge or discrimination in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) By means of coercive interrogation, threats of loss of employment or promises of benefit or in any other manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which

the Board has found will effectuate the policies of the Act:

(a) Offer to Richard Byrd and Thomas Smith immediate and full reinstatement each to his former or substantially equivalent position without prejudice to seniority or other rights and privileges and make each whole for any loss of earnings suffered by reason of discharge as provided by that section of the Trial Examiner's Decision dated November 13, 1964, entitled "The remedy."

(b) Notify Richard Byrd and Thomas Smith if they are serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents upon request for examination and copying all payroll records, social security payment records, timecards, personnel records and reports necessary to analyze the amounts of backpay due under the terms of the Trial Examiner's Recommended Order.

(d) Post at its termnials in Wendell, Idaho and Butte, Montana, copies of the notice attached hereto as an Appendix. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board (Seattle,

Washington) shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

ENDORSED, Decree Filed and Entered

WM. B. LUCK
Clerk

A TRUE COPY

ATTEST:

APPENDIX C.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,200

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

AMBROSE DISTRIBUTING COMPANY,

Respondent.

[March 9, 1966]

On Petition for Enforcement of an Order of the National Labor Relations Board.

Before: POPE, JERTBERG and DUNIWAY, Circuit Judges.

JERTBERG, Circuit Judge.

This case is before the court on the petition of the National Labor Relations Board (hereinafter the "Board"), for enforcement of its order issued against respondent pursuant to § 10(e) of the National Labor Relations Act, as amended, [29 U.S.C., §§ 151 *et seq.*] The Board's decision and order are reported at 150 NLRB No. 157. This Court has jurisdiction of the proceedings under § 10(e) of the Act.

The Board found, upon charges filed by General Teamsters, Warehousemen, Chauffeurs & Helpers Union, Local No. 483, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of American (Independent), (hereinafter the "Union"), that respondent violated § 8(a)(1) of the Act by interrogating and threatening employees concerning their Union activities and promising them benefits for refraining from such activities. The Board also found that respondent violated § 8(a)(3) and (1) of the Act by discharging two employees to discourage union activities.

Respondent is engaged in the wholesale distribution of meat and petroleum products, and operates as a private carrier by truck. It employs approximately thirty-eight truck drivers working out of respondent's terminal at Wendell, Idaho.

In September, 1963, Richard Byrd, employed by respondent as a truck driver, joined the union. Thereafter, until mid November, he solicited other drivers to do likewise. On December 12, 1963, the union filed a representation petition and on February 18, 1964, the Board conducted an election which the union lost.

On March 11, 1964, Byrd's employment was terminated by the respondent. The other discharged employee was Thomas L. Smith, a truck driver, who signed an authorization card for representation by the union in the early part of November, 1963. He was discharged on March 21, 1964.

The conclusions of the Trial Examiner that the respondent interfered with, restrained and coerced employees in the exercise of their rights guaranteed under § 7 of the Act, and engaged in unfair labor practices within the meaning of § 8(a) (1) of the Act, are based on findings of fact made by the Trial Examiner concerning statements and interrogations made by A. N. Ambrose, the owner of respondent, and Nolan G. Cooper, a supervisory employee of respondent whose position was that of "partly manager and dispatcher." Such statements and interrogations included such as these: "Now, whatever you fellows do, don't vote for the union"; that respondent had been thinking for some time about establishing a fund for permanent employees, and, although he could not promise to do so, he was considering instituting such plan should the Union be defeated; respondent was going to stop operating the trucks for a period of two weeks until the election was over; that if the Union won the election, respondent would reduce its operations so that not more than five trucks would be kept running; that respondent had a list of fifteen drivers he thought voted for the Union; that those on the list would be "sent down the road."

The conclusions of the Trial Examiner that in discharging Byrd and Smith, respondent discriminated in regard to their tenure of employment to discourage membership in and activity on behalf of the Union, and thereby engaged in unfair labor practices within the meaning of § 8(a) (3) and (1) of the Act, were based upon findings of fact made by the referee as to state-

ments and interrogations made by Ambrose to Byrd and Smith. Cooper accused Byrd of being the instigator of "this Union business." Ambrose cautioned another employee "Be careful what you say, Byrd is going to be the new shop steward in the Union." Ambrose told Smith that he could not understand why Byrd was for the Union considering the help he had given Byrd in the past. Cooper criticized Byrd for stirring up trouble and for reporting to an investigating board agent what Cooper had said to Byrd about the Union. Ambrose accused Smith of causing trouble and referred to the "Union deal."

Respondent opposes enforcement of the Board's orders on the ground that the conclusions of the Board that the respondent violated the stated provisions of the Act are not supported by substantial evidence. It is respondent's position that the statements of Ambrose and Cooper opposing unionization of respondent's employees was nothing more than an exercise by an employer of his right to freedom of speech and to inform employees that the employer is not in favor of labor organizations.

With respect to the discharges of Smith and Byrd, respondent contends that Byrd was discharged because of carelessness in the operation of respondent's trucks and for insubordination; and that Smith was discharged because of the poor character of his work; improperly using company money; failing to make a written report of a chargeable accident; making false statements concerning his physical condition and seeking

other employment when his services were needed by the respondent.

We have carefully reviewed the entire transcript of testimony taken before the Trial Examiner. Much of the testimony produced by the Government's counsel was uncontradicted. In instances where conflicts exist we note that the Trial Examiner consistently discredited the testimony of the respondent. The Trial Examiner, among other findings, found:

> "[T]hat by suggesting the possibility of bonus payments if employees would reject the Union, by saying that trucks might be sold and some operations curtailed should the Union be chosen, by saying that Union supporters would be 'sent down the road,' and in this context questioning employees about their interest or membership in the Union, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and I find, engaged in unfair labor practices within the meaning of Section 8(a) (1) of the Act.
>
> "I find that Byrd was discharged because the Respondent correctly believed him to be a leader among the employees in the movement to establish the Union as bargaining representative. The asserted reason, a damaged trailer, was but a pretext. The discharge of Smith came about because of the Respondent's fear that failure to take this action might strip from the discharge of Byrd the mantle of legality with which the Respondent had

sought to clothe it. I find that in the discharges of Byrd and Smith the Respondent was motivated by a desire to rid itself of one who had prominently supported the Union. The Respondent thereby discriminated in regard to their tenure of employment to discourage membership in and activity in behalf of the Union and has thereby engaged in unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act." [Footnote omitted.]

It is our view that on the record as a whole such findings are supported by substantial evidence.

The Board's petition for enforcement is granted.

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